U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10506198

Date: SEPT. 3, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as an assistant professor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not list all pertinent requirements for the offered position on the labor certification and that without a proper labor certification, it did not properly file the Form I-140, Immigrant Petition for Alien Worker. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS FOR COLLEGE AND UNIVERSITY TEACHERS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Generally, by approving the labor certification, the DOL certifies that there are insufficient United States workers who are able, willing, qualified, and available for the offered position at the time of the application. 20 C.F.R. § 656.1(a)(1). Under Section 212(a)(5) of the Act, U.S. workers are considered qualified for the job if they are at least minimally qualified for the job offered to the alien. However, an employer that files for certification of employment of a college or university teacher may select an alien who is found to be "more qualified" than each U.S. worker who applied for the job opportunity. 20 C.F.R. § 656.18(d). The Board of Alien Labor Certification Appeals (BALCA) has determined that this "more qualified" standard applies in cases involving college or university teacher positions regardless of whether the employer used the basic labor

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is March 12, 2019. See 8 C.F.R. § 204.5(d).

certification process at 20 C.F.R. § 656.17 or the special handling process applicable to college and university teachers under 20 C.F.R. § 656.18. Matter of East Tennessee State University, 2010-PER-00038 (BALCA Apr. 18, 2011)(en banc).[2]

Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

II. REQUIREMENTS FOR THE OFFERED POSITION

In this case, the labor certification for the position of assistant professor requires a doctoral degree in computer science or a closely related field. No training, experience, or other specific skills are required. In his denial decision, the Director quoted the regulation at 20 C.F.R. § 656.17(i)(1), which states that the "job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity." The Director reviewed the Petitioner's recruitment for the offered position and determined that the recruitment stated additional requirements beyond a doctoral degree. Specifically, he found that the Petitioner's online posting required "demonstrated evidence of leadership, skill in interdisciplinary research collaboration along with an outstanding research program, including high-profile publications and a successful record of extramural funding;" and that the Petitioner's authorized official indicated that some applicants "did not meet the minimum requirement of demonstrated potential to enhance the research capabilities of the department," and that a criminal background check is required for the position.[3] The Director also found that the Petitioner's recruitment report revealed that the Petitioner rejected U.S. applicants for not meeting requirements that were listed in the recruitment materials but omitted on the labor certification application. Thus, he found that the Petitioner failed to list all pertinent requirements for the position on the labor certification and therefore, that the labor certification was incomplete. Because the Form I-140 was

---

[2] Labor certifications involving a college or university teaching position may be filed under the basic labor certification process at 20 C.F.R. § 656.17 or the special handling process at 20 C.F.R. § 656.18. In Matter of East Tennessee State University, the employer used the basic labor certification process at 20 C.F.R. § 656.17 and selected the alien as more qualified than any of the U.S. workers who applied for the position. However, the employer included requirements for the position in its recruitment that were not listed on the labor certification, including additional languages and preferred education. The employer asserted that these were preferences, not requirements, and did not need to be included on the labor certification. The BALCA panel determined that preferences used in advertisements will be considered "implicit requirements." Id. at 12. It found that if preferences appear in advertisements, filing notices, or other recruitment steps, they must also be listed as job requirements in Section H of the ETA Form 9089. Specifically, it stated that "[t]he fact that the employer may select the alien if he or she is more qualified than each U.S. applicant for a college or university teaching position does not extinguish the reasons for requiring the employer to list all of its requirements on the Form 9089 and for the Department's treatment of preferences used in advertisements as requirements for purposes of assessing a PERM application." Id. at 13. It reiterated the principle, based in 20 C.F.R. § 656.10(c)(8) and 20 C.F.R. § 656.10(c)(9), that "employers who apply for alien labor certification must recruit in good faith, and not place unjustified hurdles in the path of U.S. applicants in an apparent attempt to discourage their pursuit of the jobs." Id. at 12 n.11. Although the BALCA panel limited its holding to applications filed under the basic labor certification process at 20 C.F.R. § 656.17, we note that the principle of good faith recruitment found in the attestations required by 20 C.F.R. § 656.10(c) applies to applications filed under 20 C.F.R. § 656.18, as well.

[3] Background checks for offered positions generally constitute job requirements. See, e.g., Matter of Honeywell Int'l, Inc., 2016-PER-00434, 2018 WL 3232449 *2 (BALCA June 27, 2018) (finding contingency on the successful completion of a background check and drug test to constitute a job requirement).

not filed with a proper labor certification, he found that the Beneficiary is not eligible for the requested benefit.

On appeal, the Petitioner asserts that the cited regulation at 20 C.F.R. § 656.17(i)(1) is not applicable to this case, as the labor certification was submitted under the special handling provisions of 20 C.F.R. § 656.18 and not under the basic recruitment provisions of 20 C.F.R. § 656.17. Thus, it asserts that the Director's analysis was in error.

At Part I of the labor certification, the Petitioner elected to use the special handling labor certification process applicable to college and university teaching positions under 20 C.F.R. § 656.18. However, the Director denied the petition for failure to meet a requirement applicable to the basic recruitment provisions of 20 C.F.R. § 656.17. He did not indicate how the cited provision at 20 C.F.R. § 656.17(i)(1) applies to cases filed under 20 C.F.R. § 656.18, nor did he analyze the Petitioner's intent to employ the Beneficiary in the offered position.[4] Therefore, we will withdraw the Director's decision and remand the matter to the Director for further review and entry of a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[4] A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions stated on an accompanying labor certification. See Matter of Izdebska, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966). If a position's actual job requirements differ from those listed on the labor certification, the Petitioner's intent to employ the Beneficiary in the offered position may be deficient, regardless of the type of labor certification process selected.